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No. _____

In The

Supreme Court of the United States

JOSE CARRILLO,

Petitioner,

v.

ACF INDUSTRIES, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of California

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the federal Safety Appliances Act ("SAA") occupies the field of railroad safety devices so completely that it preempts state tort claims arising out of a defect for which there is no regulation.

2. Where the SAA is silent with respect to a specific railroad safety device or measure, can it preempt a state tort claim based on the absence of such a device or measure?

PARTIES TO THE PROCEEDING

The petitioner in this proceeding is Jose Carrillo. The respondent is ACF Industries, Inc., the manufacturer of the railroad hopper car from which Carrillo fell, sustaining the injuries giving rise to this litigation. Wincup Holdings, Inc., the operator of the hopper car, was also sued by Carrillo, but settled with Carrillo before trial.

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PETITION FOR A WRIT OF CERTIORARI

Jose Carrillo respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of the State of California in this case.

OPINIONS BELOW

The opinion of the California Supreme Court is reported at 20 Cal.4th 1158, 980 P.2d 386, 86 Cal.Rptr.2d 832 (1999). Appendix ("App.") at 1-30. The opinion of the court of appeal is reported at 64 Cal.App.4th 993, 75 Cal.Rptr.2d 632 (1998). App. at 31. The grant of review by the California Supreme Court is reported at 1998 Cal. LEXIS 5825.

JURISDICTION

The judgment of the California Supreme Court was filed and entered on July 27, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Supremacy Clause of the United States Constitution, Article VI, Clause 2. It involves the federal Safety Appliances Act (hereafter referred to as the "SAA"), 49 U.S.C. §§ 20301 et seq., the regulations issued pursuant thereto, 49 C.F.R. §§ 231 et seq., and the Federal Railroad Safety Act (hereafter "FRSA"), 49 U.S.C. §§ 20101 et seq. Pertinent excerpts of

the above provisions are set forth in the Appendix at 55-101.

STATEMENT OF THE CASE

I. INTRODUCTION

The California Supreme Court has turned the clock back more than half a century on the doctrine of preemption. This case is about the preemptive reach of the federal SAA, a railroad safety act enacted at the turn of the last century, and the regulations promulgated thereunder. For the first time in an SAA case, the California Supreme Court held that a safety feature not expressly required by the statute was nevertheless "covered" under it, for purposes of preemption, and that consequently, a state tort claim against the railcar's manufacturer involving that feature was barred. The decision herein was based on the California Supreme Court's determination that the SAA preempted the entire field of railcar safety devices. In reaching this conclusion, the California Supreme Court not only set new precedent which conflicts with this Court's authorities on preemption by the SAA, but it also bucked the tide of this Court's more recent preemption decisions involving the FRSA and other federal statutes, all of which are characterized by a strongly stated, and applied, presumption against preemption. With a holding contrary to virtually all precedent, the California Supreme Court's decision should be reviewed by this Court.

Although the SAA dates back one hundred years, there have been a spate of recent reported cases from all over the United States in which the question of the SAA's

preemption of state law has been a central issue. As a result of confusion between holdings and dicta of the United States Supreme Court SAA precedents, which largely were decided in the early part of the century, cases in the lower federal courts and in state courts across the country are grappling with apparently conflicting and unclear opinions.[1] There is a need for guidance and clarification from this Court. Petitioner Jose Carrillo ("Carrillo") seeks a Writ of Certiorari for this reason and also because petitioner believes that the California Supreme Court erred in its interpretation and application of the federal SAA as preempting the field with respect to state law.

II. FACTS MATERIAL TO THE QUESTION PRESENTED.

A. Carrillo's Claims Arose Out Of A Fall Off Of A Railcar.

Carrillo worked as a truck driver for a chemical company. On June 30, 1992, Carrillo delivered plastic pellets made of polystyrene to a local customer, Wincup Holdings, Inc. ("Wincup"). During this delivery, Carrillo and Wincup employees used a rope to help lift Carrillo's truck's hose to the top of the rail car where Wincup employees inserted the hose into the hatch of the rail car. The Wincup employees then left the area of the rail car and Carrillo began pumping his delivery into the rail car. After about 30 minutes, Carrillo noticed that material

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[1] Indeed, often both parties to litigation rely on the same authority for the opposite contentions. *See Jordan v. Southern Ry. Co.*, 970 F.2d 1350, 1353 (CA4 1992).

began coming out of the top of the rail car. The Wincup employees failed to return when they said they would, and finally, Carrillo climbed on top of the rail car to adjust the hose. In the course of trying to do so, Carrillo fell backwards and off the side of the rail car. He hit the building next to the rail car with his hand and then fell to the ground. Carrillo sustained serious injuries from this fall.

The hopper car from which Carrillo fell was manufactured by ACF Industries, Inc ("ACF"), respondent herein. The top of the hopper car is 15 feet 3 inches from the rail track, and it constitutes a work platform on which it is expected that people will be performing work. There are two walkways on each side of the top of the hopper car. These walkways are approximately two feet wide. The top of the hopper car is completely open on its sides without guardrails or any other device to protect against falling from the top of the car.

B. Procedural History Of The Litigation.

Carrillo filed an action against Wincup for negligence and against ACF for negligence, breach of express warranty, breach of implied warranty, and strict liability. Carrillo's action against Wincup settled prior to trial. Carrillo proceeded to trial against ACF only on his claim of strict liability.

During the trial, Carrillo contended that ACF was liable for his injuries because it had defectively designed the hopper car from which he fell by not providing some form of fall protection. He asserted that ACF defectively designed the car by not providing either a single high

guardrail or two single rails, 2-3 inches above the walkway, to which workers could have attached a lanyard to act as fall protection. Carrillo asserted there also should have been warnings and instructions directing workers that they should not be working on the top of the hopper car without fall protection equipment.

At the close of Carrillo's case, ACF moved for nonsuit on the ground that federal law preempted Carrillo's claims. Vol. 3, Clerk's Transcript ("CT"), at 508. ACF renewed its preemption argument before the case went to the jury in a motion for a directed verdict. Vol. 7, Reporter's Transcript ("RT") at 1646. The trial court denied both motions from the bench and by minute order without substantive comment about the claim of preemption. 7 RT 1657; 3 CT 534.

The jury found that ACF was liable to Carrillo for the damages he sustained because of strict liability for both a design defect and a failure-to-warn defect of the hopper car. The jury awarded Carrillo economic and non-economic damages. ACF made post-trial motions for a new trial and judgment notwithstanding the verdict, each of which contended in part that the SAA preempted a state court from hearing Carrillo's claims. 4 CT 657, 679. ACF asserted that fall protection from the top of the hopper car was covered by the SAA because it came within a broad field of safety appliances for railcars. The trial court denied both motions. On February 26, 1996, judgment was entered for Carrillo. See Appendix (hereafter "App.") at 52.

The court of appeal affirmed the judgment in its opinion filed June 11, 1998, rejecting ACF's arguments

that the SAA and the FRSA required federal preemption of the issues. App. at 31. The court of appeal stated,

> [W]e conclude that defendant has failed to sustain its burden of showing the SAA preempts a field of "safety appliances," beyond those that it requires, and that it therefore bars common law relief on account of the defects advanced by plaintiff. App. at 42.

After the court of appeal denied rehearing July 10, 1998, ACF filed for review in the California Supreme Court.

In a decision filed July 27, 1999, the California Supreme Court reversed the court of appeal, with Justice Mosk filing a dissenting opinion. App. at 1. The supreme court wrote,

> Here, we have a case of field preemption, which by definition means congressional intent generally extends beyond the express terms of the statute and regulations to all aspects coming within their contemplation. App. at 14.

These two statements from the opinions below frame the question at the heart of this appeal: Does the SAA preempt a state law claim involving a device not specifically required by the law or its regulations?

C. The Federal Statutes In Question: The SAA And The FRSA.

The SAA was enacted by Congress between 1893 and 1910 in a series of measures intended to prescribe specific safety appliances which various railcars were required to have. For example, the statute mandates that railcars must have couplers, secure sill steps, and efficient hand

brakes. 49 U.S.C. § 20302(a)(1)(A)-(B), App. at 56. When required by the Secretary of Transportation ("Secretary"), secure ladders and running boards must be attached, and in specified locations for security in coupling, and with ladders, hand-holds or grab-irons are required. *Id.* at § 20302(a)(1)(C) and (2), App. at 57. The Secretary is authorized to "change the number, dimensions, locations, and manner of application . . . for safety appliances required . . . only for good cause and after providing an opportunity for a full hearing." *Id.* at § 20302(d)(1), App. at 58. The SAA applies only to this narrow list of equipment, and those few other devices specified by the regulations implementing it. The SAA currently covers, and did in 1910, locomotives, cabooses, passenger cars, in addition to several types of tank cars, gondola cars, flat cars, and hopper cars. *See* 49 C.F.R., Part 231, App. at 60-61 shows list of covered cars. The statute has no express preemption clause.

The regulations issued pursuant to the SAA regarding safety appliances are found at 49 C.F.R. Part 231. Excerpts pertinent to the arguments *infra* are included in the Appendix hereto at 60-101. The regulations set forth extremely detailed requirements concerning the number, location, dimensions, and manner of application of each of the devices enumerated in the statute with respect to each of the distinct type of railcars found on trains. *See* 49 C.F.R. § 231.28, referencing §§ 231.1, 231.27, App. at 100.

In 1970, Congress enacted the FRSA in order to "promote safety in every area of railroad operations. . . . " 49 U.S.C. § 20101, App. at 59. Legislative history makes evident that Congress intended to leave existing rail safety statutes, including the SAA, in place when it enacted the FRSA. *See* H.R. Rep. No. 91-1194, 2d Sess.

(1970) at 2, *reprinted in* 1970 U.S. Code Cong. & Admin. News ("U.S.C.C.A.N."), 4104, 4105, 3 CT 485. Congress nevertheless included a limited preemption clause preceded and followed by savings clauses in the FRSA. The provision is as follows:

> A State may adopt or continue in force a law, regulation, or order relating to railroad safety until the Secretary of Transportation prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation or order relating to railroad safety when the law, regulation, or order – (1) is necessary to eliminate or reduce an essentially local safety hazard; (2) is not incompatible with a law, regulation, or order of the United States government; and (3) does not unreasonably burden interstate commerce. 49 U.S.C. § 20106, App. at 59.

D. The Decisions Below.

1. The Court Of Appeal Found The SAA Only Preempts State Law Regarding Devices Specifically Required By The SAA.

Appeal to the court of appeal by respondent was based on two contentions – that Carrillo's claims were preempted by federal law and that Carrillo failed to establish that he should prevail on his tort claims. The appellate court rejected both arguments and affirmed the trial court's judgment. Since the appeal to the California Supreme Court and the instant Petition are based on the

preemption claim only, Carrillo will discuss only the portion of the court of appeal's opinion relating to the claim of preemption.

The appellate court began its discussion of the legal issues with a brief review of the three basic types of preemption of state law by federal law: express, implied or field, and conflict preemption. The court wrote that "in areas such as health and safety, in which the states have traditionally exercised authority, there is a presumption against such preemption, absent a clear manifestation of congressional purpose." App. at 35, citing *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 116 S.Ct. 2240, 135 L.Ed.2d 700 (1996). ACF's contention was that the SAA preempted the field of "safety appliances," and as a result, Carrillo's claim was covered. ACF contended that since the FRSA similarly regulated railcar safety appliances, its preemption clause expressly preempted Carrillo's claims.

The court of appeal observed of the SAA, that, "[o]n its face, this statutory scheme does not evince an intent to occupy the field of safety equipment or measures for railroad cars." App. at 36. To establish the contrary, ACF had cited a number of cases. Regarding those cases, the court said,

> But these cases do not bear such sweeping significance. Although the opinions contain language regarding preemption by the SAA, the holdings of the cases establish no more than preemption with respect to the specific types of appliances required and regulated under it. In context, the language on which defendant [ACF] relies either relates to that subject matter, or is dictum, or both. App. at 36-37.

The court of appeal discussed a number of this Court's decisions which support its conclusion that the SAA's preemption is limited to the specific appliances it requires. App. at 38-41, citing *Atlantic Coast Line v. Georgia*, 234 U.S. 280 (1914); *Penn. R. Co. v. Pub. Service Comm.*, 250 U.S. 566 (1919); *Napier v. Atlantic Coast Line*, 272 U.S. 605 (1926); *Gilvary v. Cuyahoga Valley Ry.*, 292 U.S. 57 (1934); *Terminal R. Assn. v. Brotherhood of R. Trainmen*, 318 U.S. 1 (1943).

The court of appeal's analysis of the FRSA's express savings and preemption clause reached the same conclusion as it had with the SAA, reinforced by the existence of the express clause. Unless federal regulations "substantially subsume the subject matter of the relevant state law," the FRSA does not preempt. App. at 43, quoting *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658, 664 (1993). According to the court of appeal, the measures upon which Carrillo's claim is founded are not duplicated, covered or subsumed by any of the items required by the SAA or its regulations. The court concluded that neither the SAA nor the FRSA "covers either the subjects of plaintiff's claims nor the broad and undefined field for which defendant contends." App. at 45.

2. The California Supreme Court Held The SAA Preempted The Field Of Railcar Safety Devices.

The California Supreme Court came to exactly the opposite conclusion as the court of appeal. The supreme court's opinion said, "Here, we have a case of field preemption, which by definition means congressional intent generally extends beyond the express terms of the statute

and regulations to all aspects coming within their contemplation." App. at 14.

The case the California Supreme Court (and ACF) relied upon most heavily was *Southern Railway Co. v. Railroad Commission, Indiana,* 236 U.S. 439 (1915) ("*Southern*"), one of the decisions of this Court that discusses the preemptive effect of the SAA. In that case, an Indiana statute required that railroad cars have hand-holds and grab-irons on their sides and ends, just as already required by the SAA. The Court held that the defendant could not be held liable under both the federal and the state statute because Congress had legislated "as to the appliances" with which railcars had to be equipped. *Southern, supra,* 236 U.S. at 446. The California Supreme Court quoted dicta from *Southern,* "the exclusive effect of the Safety Appliance Act did not relate merely to details of the statute . . . but extended to the whole subject of equipping cars with appliances intended for the protection of employe[e]s." App. at 5.

Next, the California Supreme Court reframed ACF's failure to provide fall protection and warnings as a lack of "guardrails" which are so close in their purpose and function to the appliances that are specified in the SAA that they also come within the SAA, citing *Shields v. Atlantic Coast Line Railroad Co.,* 350 U.S. 318 (1956). App. at 8. The court distinguished cases cited by Carrillo, charging at one point that "[p]laintiff's contrary theory that the SAA preempts only the limited class of devices expressly enumerated conflates field preemption with conflict preemption." App. at 10. In concluding, the supreme court conceded that "plaintiff's cause of action is based upon an alleged defective design of a railcar for failure to include a safety appliance not prescribed by the

statute or its implementing regulations." App. at 17. Nevertheless, the supreme court held that "Because the SAA 'touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject,' " the state claim was barred. App. at 17.

3. The Dissenting Opinion Agreed With The Court Of Appeal.

Justice Mosk's dissenting opinion disagreed with the majority, stating that "where the federal regulations are silent concerning the use of particular safety devices, there is no preemption of state common law claims." App. at 19. In response to the majority of the supreme court having found field preemption by the SAA, the dissent pointed out that,

> Since the SAA was enacted, between 1883 and 1910, *no United States Supreme Court or lower federal court decision in point has ever so held:* in each case where the SAA was found to preempt state law, it was because the particular safety device at issue was specifically enumerated in federal regulations. App. at 19. (Emphasis in original.)

The dissent noted that the SAA "provides for a narrow list of equipment for certain types of railroad cars," and that "[n]othing on the face of the statutory scheme . . . indicates that Congress intended to occupy the entire field of safety equipment for railroad cars." App. at 24. Reviewing this Court's decisions concerning the preemptive effect of the SAA, the dissent found, contrary to the

majority, that they confirm "the SAA does not have preemptive effect when the federal law is silent about a particular safety feature." *Id.*

The dissent also disagreed with the supreme court's stated underlying reason for its holding: "the 'vital' need for national standards in this area." Rather, the dissent contended, "the better 'guiding principles' in this area support the conclusion that when the SAA has *not* spoken, *safety* comes first." App. at 19. (Emphasis in original.)

REASONS WHY THE PETITION SHOULD BE GRANTED

III. THE CALIFORNIA SUPREME COURT'S DECISION CREATES CONFUSION IN THE LAW BY RELYING ON AMBIGUOUS DICTA IN EARLY DECISIONS OF THIS COURT TO REACH A RESULT WHICH CONFLICTS WITH MORE RECENT DECISIONS OF THIS COURT.

A. No United States Supreme Court Decision Has Held That The SAA Preempts State Regulation Of Safety Devices Not Enumerated By The SAA Or Its Regulations.

This Court first recognized the limited preemptive effect of the SAA shortly after the statute was enacted in *Atlantic Coast Line Railroad Co. v. Georgia*, 234 U.S. 280 (1914) (*"Atlantic Coast"*). In *Atlantic Coast*, the railroad was convicted of violating a Georgia statute which required that all locomotives run after dark be equipped with headlights. The railroad contended that the Georgia

statute was preempted by the SAA, among other federal acts. The Supreme Court held otherwise, stating,

> [I]t is manifest that none of these acts provides regulations for locomotive headlights. . . . The most that can be said is that . . . Congress has not yet decided to establish regulations, either directly or through its subordinate body, as to the appliance in question. *The intent to supersede the exercise of the state's police power with respect to this subject cannot be inferred from the restricted action which thus far has been taken. Id.* at 293-94 (emphasis added.)

One year later this Court held in *Southern Railway Co. v. Railroad Commission of Indiana*, 236 U.S. 439, 446 (1915) (*"Southern"*), that a rail carrier moving intrastate freight on interstate lines could not be penalized under both an Indiana state statute and the SAA for its failure to equip its railcars with grab-irons and hand-holds because Congress had "legislated as to the appliances" with which railcars were to be furnished. As a result, with respect to appliances such as hand-holds and grab-irons which were specified in the SAA, the Court held that only Congress had jurisdiction to penalize the railroad. *Id.* The holding in *Southern* is not that the SAA preempts the field of safety appliances as the California Supreme Court contended.

Although the holding in *Southern* involved the preemption of a state law which concerned devices enumerated by the SAA, there is dicta in the opinion which both ACF and the California Supreme Court rely upon to support their contentions. The language in *Southern* relied upon by the supreme court and ACF includes:

> [S]o far as it did legislate, the exclusive effect of the [SAA] did not relate merely to details of the statute and the penalties it imposed, but extended to the whole subject of equipping cars with appliances intended for the protection of employees. The States thereafter could not legislate so as to require greater or less or different equipment; nor could they punish by imposing greater or less or different penalties.
>
> . . . .
>
> . . . Congress has so far occupied the field of legislation relating to the equipment of freight cars with safety appliances as to supersede existing and prevent further legislation on that subject. *Southern, supra,* 236 U.S. at 446-47.

Admittedly, this dicta is field preemption language, and it is difficult to parse the holding from the dicta in the case.[2] As a result, courts and parties today cite *Southern* when they argue that the SAA preempts the field of safety appliances.

Doubt about what the Supreme Court intended in *Southern* seemed to be settled eleven years later in *Napier v. Atlantic Coast Line Railroad Co.*, 272 U.S. 605, 611 (1926) (*"Napier"*). In *Napier*, this Court expressly recognized that since the SAA only applies to a specific list of equipment,

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[2] Carrillo contended that this language was dicta also based upon the Court's citation of *Atlantic Coast* in *Southern* for the statement, "Congress of course could have 'circumscribed its regulations' so as to occupy a limited field." *Southern, supra,* 236 U.S. at 446. Had the Court intended that *Southern* stand for the wholly contrary proposition, would it not have expressly overruled *Atlantic Coast,* rather than cite it for its holding?

rather than a "generic class of safety appliances," Congress did *not* intend for the SAA to occupy the entire field of safety appliances. This was a case concerning whether Congress evidenced an intent to preclude states from requiring various safety devices in locomotives by the federal SAA or the (Locomotive) Boiler Inspection Act ("BIA"), 49 U.S.C. § 20701.[3] In determining whether the state statutes were preempted by either of the federal laws, the Supreme Court stated,

> Obviously it did not do so by the Safety Appliance Act, since its requirements are specific. . . . But the power delegated to the Commission by the Boiler Inspection Act is a general one. It extends to the design, the construction, and the material of every part of the locomotive and tender and of all appurtenances. *Id.*

Thus, the Supreme Court held that while the BIA occupied the field and preempted the state statutes, the specific requirements of the SAA established that it was not intended to preempt the field of railroad safety.[4] *Id.* at 613.

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[3] The BIA regulates the overall safety of boilers and locomotives, and the SAA regulates locomotives, as well as other railcars, by requiring that they have specific pieces of safety equipment. *See* 49 C.F.R. §§ 231.15, 231.16, 231.29.

[4] The instant case does not involve the BIA. That statute applies to boilers and locomotives only, and the instant case involves the SAA and a hopper car. However, the California Supreme Court is currently reviewing the question of the preemptive scope of the BIA in *Scheiding v. General Motors Corp.*, 65 Cal.App.4th 1310, 77 Cal.Rptr.2d 339 (1998), *rev. granted*, 1998 Cal. LEXIS 7027 (10/28/98).

Cases decided by the Supreme Court which followed *Napier* were consistent with its narrow interpretation of the SAA's preemptive reach. *See, e.g., Atchison, Topeka & Santa Fe Ry.Co. v. Scarlett*, 300 U.S. 471, 475 (1937) (Court held that injurious design of a brace rod adjacent to ladder was the cause of plaintiff's injury and brace rod not covered by the SAA; plaintiff not entitled to damages for SAA violation, but able to recover for common law negligence); *Terminal R. Assn. v. Brotherhood of R. Trainmen*, 318 U.S. 1, 4 (1943) (*"Terminal R. Assn"*) (Court held that because federal statutes, including the SAA, did not require cabooses, state order requiring them not preempted.) This Court has not squarely addressed whether the SAA preempts a state railroad safety requirement since *Terminal R. Assn* was decided, more than fifty years ago.

B. Because Of Misleading Dicta In Early SAA Cases And The California Supreme Court's Decision Herein, The Scope Of The SAA's Preemptive Effect Is Now In A State Of Confusion.

Decided during a period in which the scope of federal preemption was more broadly construed than it is today, other early SAA preemption decisions, like *Southern*, include dicta which easily can be misconstrued to support a field preemption argument. Because there is no recent precedent, these cases frequently are cited in current disputes over safety requirements for railroads. The California Supreme Court's opinion did exactly that.

In addition to *Southern*, the California Supreme Court relied mistakenly on three other Supreme Court decisions to support its holding that the SAA preempts the field of

rail safety devices: *Pennsylvania Railroad Co. v. Public Service Commission*, 250 U.S. 566, 569 (1919) ("*Penn. R.R. Co.*"); *Gilvary v. Cuyahoga Valley Railway*, 292 U.S. 57, 60-61 (1934) ("*Gilvary*"); and *Shields v. Atlantic Coast Line Railroad Co.*, 350 U.S. 318 (1956) ("*Shields.*") None of the actual holdings in these cases supports field preemption by the SAA, but language within these decisions is relied upon for that conclusion.

In *Penn. R.R. Co.*, this Court held that the SAA preempted a Pennsylvania law requiring for safety purposes that the last car of a train have a 30 inch platform, guardrails, and steps. The plaintiff railroad was found to be in violation of the state law because the last car on its train, a mailcar, did not have these features. The Court found that the SAA's regulation which expressly allowed caboose cars without platforms directly conflicted with the state statute and found in favor of the railroad that the state law was preempted. *Penn. R.R. Co., supra*, 250 U.S. at 569.

In so finding, the Court stated that when the federal government "has exercised its exclusive powers over interstate commerce so far as to take possession of the field," states cannot "supplement" or "annul" those requirements. Based on this language and the fact that mailcars *per se* were not covered in the regulations and did not resemble cabooses, the case was relied upon by the California Supreme Court to support its conclusion that the SAA preempted the field. However, this Court later clarified in *Terminal R. Assn* that it did not intend this reading to be given to *Penn. R.R. Co. Terminal R. Assn., supra*, 318 U.S. at 4 (Court found state requirement that trains have cabooses not preempted because there were no federal regulations on the subject; opinion stated

absence of specific requirement defeats preemption – "[t]his and no more is the effect of" its earlier decision in *Penn. R.R. Co.*) Nevertheless, courts and parties still rely upon *Penn. R.R. Co.* for the broader reading.

Similarly, the California Supreme Court cited the following language from *Gilvary*: "So far as the safety equipment of [rail] vehicles is concerned, these Acts [the SAA] operate to exclude state regulation whether consistent, complementary, additional, or otherwise." *Gilvary, supra,* 292 U.S. at 60-61; App. at 6, 9, 14. ACF also cited this case below. However, so did Carrillo because upon close reading of the decision, it is apparent that the comment is dicta. In *Gilvary,* a railroad employee sued for injuries under the SAA as a result of the defendant's violation of the SAA's requirement that all couplers have automatic coupling mechanisms. The plaintiff could have maintained such an action except that prior to his accident, he and the defendant had elected that they would both be governed exclusively by the Ohio Workmen's Compensation Act in the event of any injury while engaged in intrastate commerce. *Id.* 202 U.S. at 59. As a defense to plaintiff's suit under the SAA, defendant asserted the election. This Court held for the defendant, finding nothing in the agreement between the parties "repugnant" to the SAA. *Id.* at 62.

Finally, the California Supreme Court relied upon *Shields* when it declared that there was "parity" between the lack of fall protection and warnings leading to Carrillo's accident, and the guardrails required for tank cars by federal regulations. App. at 8. Not a preemption case, *Shields* nevertheless involved interpretation of whether "dome running boards" on tank cars were safety

appliances included within the "running boards" mandated under the SAA, even though they were not mentioned in federal regulations.

In *Shields*, the plaintiff sued the railroad for damages on theories of an SAA violation and common law negligence in connection with his fall from a rotted running board along the top of a tank car's dome. The court of appeal held that "dome running boards" were not safety appliances covered by the SAA and remanded for trial on the negligence claim only. The Supreme Court reinstated the trial court judgment to allow suit for an SAA violation, holding that because "running boards" were required by § 2 of the SAA (now 49 U.S.C. § 20302(a)(1)(C)), dome running boards were covered by the SAA even though the regulations had not "standardized" them under § 3 of the SAA (now 49 U.S.C. § 20302(d).) *Id.* 350 U.S. at 321-22.

In 1992, the Fourth Circuit was faced with reconciling the holding in *Shields* with its own decision in *Jordan v. Southern Railway Co., supra,* which found there was no SAA violation where a plaintiff sought damages for injuries from a defective "door and ratchet mechanism." It was very clear to the court that the device at issue was not covered. The court said, "we would think it clear that the Safety Appliance Act creates strict liability for malfunctions in specific equipment, and no other device, however necessary for safety, falls within its reach." *Jordan, supra,* 970 F.2d at 1352-53.[5] But, noting that both

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[5] The Fourth Circuit also wrote, "the [SAA] statute nowhere defines a generic class of 'safety appliances.' Instead, the statute contains a strikingly specific laundry list of equipment. . . . " *Jordan, supra,* 970 F.2d at 1352. Nevertheless,

parties relied on *Shields*, the court observed, "[t]he sparse case law somewhat muddles the matter, though." *Id.* at 1353. Finally, the court explained its holding as follows:

> [I]t is not necessarily dispositive of a Safety Appliance Act claim that the malfunctioning device is not specifically prescribed in the § 12 [now § 20302(d)] regulations. However, the absence of a device from § 11 [now § 20302(a)] is fatal. *Id.* at 1354.

Even though neither *Jordan* nor *Shields* are preemption cases, courts and parties quote from them in support of both sides of the SAA preemption question.

When courts now deciding SAA preemption cases look to precedent, the only direct precedent from this Court dates from fifty to eighty years ago. Obviously, these older cases do not reflect the law's dramatic shift from the early cases of *ipso facto* preemption to a much narrower and more exacting application of the doctrine. Thus, more recent SAA cases are left with the older, more ambiguous language which is susceptible to being misconstrued and misused (as the California Supreme Court has done herein), and which is not consistent with this Court's recent preemption decisions involving other federal statutes.

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the California Supreme Court found support in *Jordan* for its opinion, quoting, "the categories of safety appliances created by [the SAA] . . . should be broadly read to include every device falling within that category. . . . " App. at 7.

C. Today There Are Numerous Lower Federal And State Court Decisions Which Involve Interpreting The SAA's Preemptive Reach.

Even though faster forms of travel have overtaken railroads in the years since the SAA was enacted, lawsuits involving the SAA and injuries from railroad accidents are still numerous. The provisions of the SAA are very often key to the claims. A quick search of an online legal data base turns up tens of cases on the SAA in the last five years. (Results are similar for suits involving the related FRSA.) Just this year, in a case strikingly similar to that herein, a federal district court found, contrary to the holding of the California Supreme Court here, that the SAA did not preempt a wrongful death action based upon design defect and failure to warn theories concerning the danger of falling into a covered hopper car. *Garay v. Missouri Pacific R.R. Co.*, 38 F.Supp.2d 892, 898 (D.Ka. 1999).

Recent decisions in federal courts of appeal also discuss the scope of the SAA's preemption. *Moses v. Union Pacific R.R.*, 64 F.3d 413, 418 (CA8 1995) (Where plaintiff was injured when a "pull plate" came off a railcar, court held the SAA does "not extend to appliances not enumerated" in the law); *Monongahela Connecting R.R. Co v. Penn. P.U.C.*, 373 F.2d 142, 148 (CA3 1967) (State order to railroad to install air brakes on "hotmetal" cars not preempted by SAA because cars not engaged "in moving interstate traffic"; "Where federal legislation admits of a gap the state may pass appropriate laws, to take care of needed protection, which do not conflict with their federal counterparts.")

Other state courts also have considered the question of SAA preemption. *Rucker v. Norfolk & Western Ry. Co.*, 77 Ill.2d 434 (Ill. S.Ct. 1979) (Court ruled plaintiff could sue for design defect due to absence of "headshield," an item not required by SAA at time rail car manufactured); *Hercules, Inc. v. Eilers*, 458 S.W.2d 221, 229-30 (Tex.Ct.Civ. App. 1970), *cert. denied*, 403 U.S. 937 (1971) (Court held defendant could not be held strictly liable under SAA because tank car dome lids "are not mentioned in the Act, regulations, or otherwise," but defendant could be sued for negligence.)

D. The Scope of SAA's Preemption Is Still Litigated Frequently Despite The FRSA's Express Savings And Preemption Clause.

In briefing below, ACF argued that the FRSA also preempted Carrillo's claims. Although the California Supreme Court found it unnecessary to reach the question of preemption under the FRSA, (App. at 16, fn. 3), the court of appeal had rejected ACF's argument. App. at 45. In fact, the court of appeal viewed the FRSA as confirmation that its more narrow reading of the SAA's scope of preemption was correct. App. at 42.

With respect to the preemptive effect of the FRSA, there is both a limited preemption and savings clause. Undeniably, the FRSA expressly protects states' rights to regulate railroad safety regarding matters not covered by federal regulation. The FRSA provides, in pertinent part, as follows:

> A State may adopt or continue in force a law, regulation, or order related to railroad safety until the Secretary of Transportation prescribes

> a regulation or issues an order covering the subject matter of the State requirement. 49 U.S.C. § 20106, App. at 59, also § II.C., *supra*.

In *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658 (1993) (*"CSX Transportation"*), the Supreme Court characterized this clause as a "relatively stringent standard" which operated in conjunction with the presumption against preemption. The Court explained the narrow preemptive effect to be given regulations under the FRSA:

> [A party] must establish more than that they 'touch upon' or 'relate to' that subject matter, (citations) for 'covering' is a more restrictive term which indicates that preemption will lie only if the federal regulations substantially subsume the subject matter of the relevant state law. . . . *The term 'covering' is in turn employed within a provision that displays considerable solicitude for state law* in that its express pre-emption clause is both prefaced and succeeded by express saving clauses. *Id.*, 507 U.S. at 664-65 (emphasis added).[6]

Thus, in *CSX Transportation*, the Court found no preemption of one of plaintiff's two common law negligence

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[6] *See also In re Miamisburg Train Derailment Litig.* 68 Ohio St.3d 255, 626 N.E.2d 85 (Sup. Ct. Ohio 1994) (Following *CSX Transportation*, Ohio Supreme Court held FRSA did not preempt state tort claim against manufacturer where device at issue not required by regulations.); *Ouellette v. Union Tank Car Co.*, 902 F.Supp. 5, 10 (D. Mass. 1995) (State tort claim against railroad tank car manufacturer preempted by FRSA where claims based on ill-placed tank car handhold and lack of side railing, because both subjects "directly conflict with the federal safety regulation in issue.")

claims, even though there were general federal regulations on its subject, safety at grade crossings. *Id.* 507 U.S. at 668. The instant case concerns protection from falls off the top of hopper cars, a subject about which it is undisputed there are no regulations, and thus under FRSA's savings clause and *CSX Transportation,* Carrillo's claim is not barred, either explicitly or implicitly. Despite the seeming clarity of this conclusion, because the FRSA did not supercede or amend the SAA, the California Supreme Court still found that the SAA preempts the field, without regard to the FRSA's narrower scope of preemption. Clarification and guidance from this Court is sorely needed to settle the law on the question.

IV. THE CALIFORNIA SUPREME COURT'S FAILURE TO APPLY A PRESUMPTION AGAINST PREEMPTION IN THIS SAA CASE MAY BE REPEATED IN CASES INVOLVING OTHER STATUTES.

A. The California Supreme Court Erroneously Construed The Scope Of SAA Preemption Too Broadly And Contrary To This Court's Recent Preemption Decisions.

Recent United States Supreme Court cases deciding questions of preemption by various federal laws have articulated a clear approach to the issue which narrows the reach of the doctrine. Emanating from the Supremacy Clause of the Constitution,[7] the preemption doctrine

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[7] The California Supreme Court incorrectly cited Article I, section 8 of the United States Constitution as the Supremacy Clause. See App. at 1. Article VI, clause 2 is commonly recognized as the Supremacy Clause, and it is the provision under which preemption cases arise.

provides that federal law supersedes state law which conflicts with it, explicitly or implicitly. *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981), *English v. General Elec. Co.*, 496 U.S. 72, 78-9 (1990). Describing implicit preemption, this Court stated,

> We have recognized that a federal statute implicitly overrides state law either when the scope of a statute indicates that Congress intended federal law to occupy a field exclusively . . . [citation], or when state law is in actual conflict with federal law. We have found implied conflict pre-emption where it is 'impossible for a private party to comply with both state and federal requirements,' . . . [citation], or where state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' [citation]." *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995) ("*Myrick*").

The Supreme Court also recognized that the areas of health and safety "are 'primarily, and historically, . . . matter[s] of local concern' " and thus areas in which states historically "have exercised their police powers." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 116 S.Ct. 2240, 2245 (1996) ("*Medtronic*"). These police powers are "not to be superseded" by federal law "unless that was the clear and manifest purpose of Congress." *Id.*, 116 S.Ct. at 2250 (citations omitted.)

"[I]n light of the strong presumption against preemption," the Supreme Court declared that both the existence and the scope of any preemption must be construed narrowly. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 523 (1992) ("*Cipollone*"). Thus, the Court held in *Myrick* that common law claims against manufacturers for a design

defect (the lack of an "anti-lock braking system" in tractor-trailers) were not preempted by the National Traffic and Motor Vehicle Safety Act ("NTMVSA") where the statute had an express preemption clause, and regulations did not require such braking systems. The Court stated, "We hold that *the absence of a federal standard cannot implicitly extinguish state common law.*" *Myrick, supra,* 514 U.S. at 282 (emphasis added.) These recent cases, in addition to the other authority discussed in this Petition, contradict the California Supreme Court's argument that the SAA was intended to occupy the "field" of railcar safety and therefore preempt state law even in the absence of federal regulation.

Nevertheless, the California Supreme Court's opinion failed to address directly the presumption against preemption established in this Court's more recent cases. Moreover, the supreme court found various ways to distinguish Carrillo's case and the SAA from those decisions, including *Medtronic*. See App. at 12-15. If allowed to stand unreviewed, the decision in the instant case may become precedent for other cases, involving other statutes, which fail to apply the preemption doctrine narrowly. For that reason, as well, this Court should review this case.

B. The California Supreme Court Was Wrong About The FRSA's Primary Purpose – It Is Safety, Not National Uniformity.

Instead of directly addressing Carrillo's contention that current law requires a narrow view of the scope of preemption, the California Supreme Court argued that it was Congress' intent to occupy the field of railcar safety

devices in order to preserve national uniformity. App. at 15.[8] Contrary to the supreme court's contention that Congress' goal in enacting these laws was "uniform federal railroad regulation," the statute's plain language and legislative history could not be more clear: "The purpose of this chapter is to promote safety in all areas of railroad operations and reduce railroad-related accidents and incidents."[9] 49 U.S.C. § 20101. App. at 59. Drafters of the legislative history began the section on the need for the legislation, "Safety first!" H.R. Rep. No. 91-1194, 2d Sess. (1970), *reprinted in* 1970 U.S.C.C.A.N. 4104, 4105, 3 CT 485. National uniformity of regulations "to the extent practicable" is a secondary goal of the FRSA. *Id.* at 4116, 3 CT 492. Thus, the California Supreme Court has seriously misread the underlying Congressional purpose of current railroad safety laws.[10] This error too should be corrected by this Court.

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[8] The California Supreme Court relied on an argument made by Judge Kozinski in *Law v. Gen. Motors Corp.*, 114 F.3d 908 (CA9 1997), to support its position. However, *Law* involved the question of the preemptive scope of the BIA, an entirely distinct statute from the SAA, and one which has been found by numerous decisions to preempt the field of boiler and locomotive safety. *See, e.g., Napier, supra,* 272 U.S. at 605.

[9] The legislative history described the purpose of the law in virtually the same words. H.R. Rep. No. 91-1194, 2d Sess. (1970), *reprinted in* 1970 U.S.C.C.A.N. 4104, 3 CT 484.

[10] In the analogous context of automobile safety lawsuits, courts have faced arguments similar to those of the supreme court and ACF about the purportedly overriding need for uniformity and hence federal preemption. In a lawsuit concerning the preemptive effect of the NTMVSA in a state tort action, the third circuit countered this argument as follows:

In sum, review by this Court is compelled for a number of reasons. It has been some fifty years since the Court last squarely addressed the question of the SAA's scope of preemption. However, the question continues to be raised in litigation around the country. Because the cases which do address the issue are outdated, they frequently contain dicta which is misleading and difficult to distinguish from their holdings. Consequently, confusion about the state of the law exists. It was this confusion which produced the California Supreme Court's decision, one which is flatly wrong, but has no shortage of seemingly supportive citations and quotes. As the highest court in the country's most populous state, the California Supreme Court is followed by many courts across the nation. If the *Carrillo* decision is left to stand as it is, the last fifty years of development in the preemption doctrine will be severely undermined. Without review and clarification of this issue by this Court, other courts grappling with railroad safety cases, or preemption cases involving other statutes, will be left in a quandary as to the correct view of the law. Clarification of the scope of the SAA's preemptive effect is needed both to guide litigants and courts in SAA cases, and to insure that the preemption

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> Uniformity was not Congress' primary goal in enacting the Safety Act. . . . Congress declared that the Safety Act's purpose was 'to reduce traffic accidents and deaths and injuries. . . . ' In the face of this clear declaration of congressional purpose, we are unwilling to accept an overly broad notion of preemption based on uniformity that could have the effect of undercutting Congress' concern for safety. *Pokorny v. Ford Motor Co.*, 902 F.2d 1116, 1123 (CA3 1990) (citations omitted.)

doctrine, as it has evolved to date, is applied to federal statutes in a consistent fashion.

CONCLUSION

For the reasons discussed above, the petition for a writ of certiorari should be granted.

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Respectfully submitted,

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